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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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"New" Supreme Court Rules In Favor Of Landowner!

By Mark Masters

In *Kachudas v. Invaders Self Auto Wash, Inc.*, _ Mich _ (2010), the Supreme Court held that an icy condition on the premises was open and obvious, and that there was no independent claim for negligence which would survive.

In *Kachudas*, an icy condition was allegedly created from spraying water outdoors in freezing temperatures at Defendant's self-serve car wash. Plaintiff was allegedly injured by slipping on the icy condition, and sued under premises liability and general negligence theories. In recent years, claimants have argued (with some success) that the open and obvious defense would not apply to separate claims of ordinary negligence, but only to premises liability theories of recovery.

The trial court dismissed the entire case on the open and obvious defense, but the Court of Appeals reversed in part, holding that Plaintiff's claims sounding in negligence were not subject to dismissal based on the open and obvious defense, which only applies to premises liability claims.

SECREST WARDLE NOTES:

This decision is quite a surprise from our "new" Supreme Court. Most (if not all) commentators agree that the current configuration of the Court favors plaintiffs rather than defendants.

Here, the Court had the opportunity to essentially eliminate the open and obvious defense by allowing mere allegations of a general negligence claim to survive in a case which would otherwise be dismissed under the defense.

This opinion certainly reached the right result, but it is a surprise to many. The future of Michigan law may not be as bleak for Defendants as originally feared.

The Supreme Court held that the trial court correctly recognized that this was simply a premises liability case despite Plaintiff's attempts to characterize it otherwise. The Supreme Court held:

> "Although an injured person may pursue a claim in ordinary negligence for the overt acts of a premises owner on his or her premises, the Plaintiff in this case is alleging injury by a condition on the land, and as such, his claim sounds exclusively in premises liability."

In regard to the application of the open and obvious defense to the facts of this case, the Supreme Court further held:

> "In addition, the circuit court properly ruled that the alleged hazardous condition was open and obvious, because a reasonably prudent average user of ordinary intelligence spraying water outdoors in a temperature range of 11 to 24 degrees would anticipate the likelihood of freezing and the resulting danger therefrom."

This was a 4-2-1 decision. Justices Cavanagh and Kelly dissented in part. They believed that this was truly a premises liability case rather than a general negligence case. Therefore, the open and obvious defense would apply to the whole claim. However, they felt that there was a "question of fact" regarding the open and obvious issue which should be resolved by a jury. Justice Hathaway issued a separate dissent in which she felt that the Court of Appeals was correct.

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We welcome your questions and comments.

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